

FROM :Francis L Conte, Esq
Docket NCR-8778

FAX NO. :781 592 4618

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: M. R. Bauer

Application No. 09/556,647
Confirmation No: 7493

Filed: 04/24/2000

Title: Material Browser

) Art Unit: 3627

)

) Examiner: Fischer, A.

)

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PETITION UNDER RULES 113 and 181

MS AF
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Applicant hereby petitions under 37 CFR 1.113 and 1.181 from the final office action dated 10/22/2003.

Issue 1

Applicant traverses the examiner's objection to the specification under Rule 75, MPEP 608.01(o), and MPEP 2181 as found in enumerated para. 4.

The various means elements recited in claim 22 find express, implicit, and direct antecedent support in the specification and drawings at various locations therein, as indicated at pages 18, 23, and 26 of the 10/21/2002 Amendment.

In the para. 6b rejection of claim 22 under Section 112, para. 2, the examiner repeats the elements of para. 4a-e in 6bi-v, and further states that "the specification does not clearly link the corresponding structure to ..." the listed means.

The examiner has not adequately explained either the

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19 Dec 2003
(Date)

objection to the specification, or the corresponding rejection (which is separately addressed in the Appeal Brief). Is the examiner looking for literal antecedent support for the mere words "means for?" Or, is the examiner looking for antecedent support for the other words found in the means elements? Or both?

Those other words clearly find direct, verbatim antecedent support in the specification as previously indicated in the first Amendment in which claim 22 was introduced. And, the "means" words find implicit support in the specification by the "corresponding structure, material, or acts as described in the specification" in accordance with Section 112, para. 6.

MPEP 2181 at page 2100-219 addresses the requirements of antecedent support under Rule 75 and Section 112, first paragraph.

A test for complying with the written description requirement of 35 U.S.C. Section 112, first paragraph, is presented in *Ex parte Sorenson*, 3 USPQ2d 1462, 1463 (Board of Patent Appeals and Interferences, 1987) as follows:

By the same token, we are mindful that appellant's specification need not describe the invention in *ipsis verbis* to comply with the written description requirement. In *re Edwards*, 568 F.2d 1349, 196 USPQ 465 (CCPA 1978). The test is whether the originally filed specification disclosure reasonably conveys to a person having ordinary skill that Applicant had possession of the subject matter later claimed. In *re Kaslow*, 707 F.2d 1366, 217 USPQ 1089 (Fed. Cir. 1983)... Moreover, the Examiner has the initial burden of presenting evidence or reasons why a person skilled in the art would not recognize in appellant's specification disclosure a description of the invention defined by the claims.

And, in *Ex parte Hradcovsky*, 214 USPQ 555 (P.O. Bd. App. 1982) it was held that:

Appellant's specification as originally filed describes the invention in substantially the same terms as those employed in the claims and, thus, the description requirement of the statute has been complied with.

Claim 22 recites several means-for elements in combination; and the examiner addresses these means elements under MPEP 2181 as found in multiple paras. 22-30 presented on multiple pages 16-24.

In para. 24 at page 20 the examiner simply concludes as a matter of "the Examiner's factual determination" that the Means Phrase #1 is ambiguous and could not be interpreted by a person of ordinary skill in the art, without the examiner even addressing the particulars of the disclosure.

In para. 26 at page 21 the examiner merely contends that all the means elements "have [been] considered including the entire specification, including claims and drawings," yet the examiner has not even recognized the express support for these elements presented in the first amendment response dated 10/21/02 commencing at page 23.

"Ambigu[ous]" the examiner opines in para. 24a? Yet, in para. 45 at page 30 the examiner cites How Computers Work for the proposition that even those of low skilled in the art understand the basic construction and operation of computers. Would not those of ordinary skill know considerably more?

Beginning at page 76 of that reference, Chapter 8 describes "How Software Applications Work." At page 78, Database Managers are discussed as being implemented by software. At page 79, that reference states that "The range of tasks a database manager can perform varies with the complexity of the program." And then several jobs are listed.

This very reference provided by the examiner is clear evidence that the various means elements recited in the claims would not in any way be "ambigu[ous]" to those of ordinary skill in the art.

Even the examiner, who is not one skilled in the art, lists examples in para. 24a at page 20 as "the corresponding structure could be a CPU, hard drive, computer memory, the BIOS, other software, all of the above, or some other structure." There is clearly no ambiguity here.

The examiner's express list of common computer elements is merely representative of suitable elements for the means-for components recited in the claims. Even if any one or more of those elements could be used, is this not definite? Why would this be ambiguous? Could not one skilled in the art select which element would be most appropriate for the specific system built in

Admissions 1

conformance with the claims?

Most importantly, and notwithstanding the examiner's mere contention in para. 26, the examiner has in fact failed to afford any weight to Applicant's disclosure in evaluating the means-plus-function elements recited in the claims, including claim 22.

Claim 22 is addressed hereinbelow in accordance with the applicable MPEP provisions relating to antecedent support in the written description, and exemplary locations for the antecedent support of the various terms "linking" the specification to the corresponding terms used in the claims is presented in the [brackets], and there are many, many more occurrences of antecedent support which may be clearly found in a careful review of the written description, and associated figures.

Claim 22 initially recites means 104,106,112 [page 5, 11. 39+] for storing [page 6, 11. 8+] in a computer system 100 [page 5, 11. 29+] a list of different raw materials 306 [page 4, line 5; page 5, line 10; and page 9, 11. 22+], with each of the raw materials having various customer application criteria 304 stored therewith [page 3, 11. 17+; page 5, 11. 3+; page 9, 11. 22+], and the criteria being indicative of intended application of the raw material in a product [page 1, 11. 18+ & 28+; page 2, 11. 2+ & 8+; and page 11, 11. 1+].

Exemplary forms of the customer application criteria are presented at page 3, 11. 17+, and include: "print method, minimum application temperature for adhesive, service range of adhesive, facestock types, and adhesive type," all of which are different (various) from each other.

And, exemplary raw materials are identified at page 1, 11. 18+; and page 2, 11. 2+.

MPEP 2106 at page 2100-9 cites *In re Donaldson* and *In re Alappat* for interpreting such means-plus-function elements as found in claim 22.

MPEP 2106 at page 2100-20 states that under Section 112, first paragraph:

The claimed invention subject matter need not be described literally, i.e., using the same terms, in order for the disclosure to satisfy the description requirement. **Software**

aspects of inventions may be described functionally" in determining an adequate written description.

And, also at page 2100-20, MPEP 2106 provides that:

For a computer-related invention, the disclosure must enable a skilled artisan to configure the computer to possess the requisite functionality....

Figure 1 illustrates the computer system 100 including the processor 104, memory 106, and storage device 110, for effecting the material browser 300 shown in Figure 3. The specification is replete with detailed description of these and other features of the browser as specifically related to claim 22. Following are additional examples of such description as found in specification.

Page 3, ll. 16+, states that: "The material browser uses **software** interacting with the user to determine the most appropriate raw material required for an **application**."

Page 6, ll. 1+ states that:

Computer system 100 also includes a main memory 106, such as a random access memory (RAM) or other dynamic storage device, coupled to the bus 102 for storing **instructions** to be executed by processor 104. Main memory 106 also may be used for **storing** temporary variables, raw material types, customer application criteria, and raw material information or other intermediate information during execution of **instructions** to be executed by processor 104. Computer system 100 further includes a read only memory (ROM) 108 or other static storage device coupled to the bus 102 for storing static information and **instructions** for the processor 104. A storage device 110, such as a magnetic disk or optical disk, is provided and coupled to the bus 102 for **storing instructions**, raw material types, customer application criteria, and raw material information.

Page 7, ll. 7+, states that:

Execution of the sequences of **instructions** contained in the **main memory** 106 causes the **processor** 104 to perform the **process steps** described below. In alternative embodiments, **hard-wired circuitry** may be used in place of or in combination with computer software instructions to **implement the invention**. Thus, embodiments of the invention are not limited to any specific combination of hardware circuitry and software.

And, page 9, ll. 18+, states that:

The material browser window 300 provides decision support for selecting the most appropriate raw material for the customer's application.

What structure then in the specification corresponds with the first storing means element (a) of claim 22? The specification is quite clear, quite specific, quite definite, and clearly provides direct antecedent support for the various terms found in claim 22, with the first means element being specifically addressed above.

The invention recited in various embodiments in the claims is a computer-implemented invention, see MPEP 2106.

The claimed invention is embodied in a computer system, having various operative components, well recognized by the examiner, and in his own citation of How Computers Work, para. 45.

The computer system includes the processor 104, memory 106, and storage device 110, and is specifically configured in accordance with the claims to effect the specifically recited **functions** in both the method and apparatus claims.

And, how must that storing means be configured? By using suitable **software** to implement the instructions for manipulating the specified **data** for the specified purpose in interaction with the user in developing the corresponding product. Alternatively, the process steps could be implemented by hard-wiring.

Clearly then, the specification describes structure **directly** corresponding to the first storing means element (a), and even states some equivalents thereof; yet the examiner has overlooked the specification, and merely stated, at para. 26, that the specification has been considered.

In para. 6b at page 5, the examiner cites two cases for the nexus between the means-plus-function elements and the written description.

However, these two cases do not support the examiner's position of lack of antecedent support, but, to the contrary, support the nexus between Applicant's claims and the written description.

In the Amtel case, a high-voltage generator circuit was recited in claim 1 using means-plus-function, and depicted in the

figures as a "black box," without electrical details thereof. The Dickson article was incorporated by reference for known circuits therefor, but not considered by the court in upholding the indefiniteness rejection.

The Federal Circuit citing *In re Donaldson* and *In re Dossel* reversed.

The Federal Circuit then stated at 53 USPQ2d 1230 that "the inquiry asks first whether structure is described in specification, and, if so, whether one skilled in the art would identify structure from that description."

The Federal Circuit then found at page 1231 that: "the specification plainly states that '[k]nown Circuit techniques are used to implement high-voltage circuit 34... [and] Amtel's expert, Callahan testified that this title alone was sufficient to indicate to one skilled in the art the precise structure of the means recited in the specification."

The Federal Circuit then concluded at page 1231 that: "the specification disclosed sufficient structure corresponding to the high-voltage means limitation."

How then do the facts of this case support the examiner's position of lack of antecedent support for the means elements of claim 22?

The examiner simply presents in quotes at page 5 that "Failure to describe adequately ..." is a failure to comply with Section 112, para. 2.

Yet as indicated above, the specification is replete with description of the computer system, its components, and the process steps which incorporate the specified instructions in software, or hard-wired in the alternative.

Applicant's specification contains much, much more than the black box of Amtel, and much more than the mere statement of known circuit techniques, and the latter was quite sufficient in Amtel, and the former should be more than sufficient in the present application.

In the Dossel case, the Board of Appeals entered a new ground of rejection of claims 8 and 9 under Section 112, para. 2, as lacking in the specification a disclosure to support the means-

plus-function elements in the device for reconstructing the spatial current distributions in a biological object.

The Federal Circuit addressed the requirements of Section 112, para. 6, and the requirement therefor for adequate disclosure in the specification. The Federal Circuit then recognized that:

Neither the written description nor the claims uses the magic word "computer," nor do they quote computer code that may be used in the invention. Nevertheless, when the written description is combined with claims 8 and 9, the disclosure **satisfies** the requirements of §112 ¶2. As the written description discloses, the clauses in question claim a device that receives digital data words from a memory and data input from a user. The device then computes, from the received data, the current distributions by mathematical operations including matrix inversion or pseudo inversion, and then outputs the result to a display....

Clearly, a unit which receives digital data, performs complex mathematical computations and outputs the results to a display must be implemented by or on a general or special purpose computer (although it is not clear why the written description does not **simply state** "computer" or some equivalent phrase). To bolster this result we note that, in the medical imaging field, it is well within the realm of common experience that computers are used to generate images for display by mathematically processing digital input. Therefore, ...{the Federal Circuit held} that the requirements of § 112 ¶ 2, that the invention be particularly pointed out and distinctly claimed, are satisfied.

Note, of particular interest in this case that the Federal Circuit reversed the Section 112, para. 2, rejection without the description or claims even using the "magic word computer." In stark contrast, Applicant's specification and claims in fact recite the **computer system** in which the various means are embodied.

Claim 8 in Dossel recites means for specifying; means for measuring; and means for reconstructing.

Claim 9 in Dossel recites measuring means for determining; memory means for storing; means for determining; and reconstruction means for determining.

These plain mean-plus-function elements were sufficiently supported by the specification, notwithstanding even the lack of a disclosed computer, which computer was inherent or implied.

Yet again, Applicant's disclosure includes much, much more

than the minimal disclosure in Dossel. Applicant's disclosure expressly discloses and illustrates the computer system 100 and its hardware components, and describes the functions to be performed to effect the process instructions recited in the means for elements of the claims, including in particular claim 22 to which the examiner has taken exception.

Clearly, the examiner has overlooked the facts found in these two cases, and the analysis presented therein for the Section 112 rejection, which is equally as relevant in evaluating the description for antecedent support.

Further relevant in evaluating Applicant's computer-implemented claims are the Federal Circuit's findings in Fonar Corp. v. General Electric Co., 41 USPQ2d 1801 (1997).

Fonar's '966 patent recited in claim 1 a method for a single scan nuclear magnetic resonance (NMR) including functional steps.

Figure 7 of that patent illustrated labeled boxes for the computer and related components in which the recited functions were implemented.

The Federal Circuit stated that:

As a general rule, where **software** constitutes part of a best mode of carrying out an invention, description of such a best mode is **satisfied** by a disclosure of the **functions** of the software. This is because, normally, writing code for such software is within the skill of the art, not requiring undue experimentation, once its functions have been disclosed. It is well established that what is within the skill of the art need not be disclosed to satisfy the best mode requirement as long as that mode is described. **Stating the functions of the best mode software satisfies that description test.** We have so held previously and we so hold today.

There can be no doubt that Applicant's specification describes the computer system and its hardware components; and describes the **functional instructions** recited in the means-for elements of the claims, and therefore not only satisfies the best mode description requirement but also provides ample antecedent support to clearly link the corresponding structure in the specification to claim 22, notwithstanding the examiner's mere contention to the contrary.

The examiner has clearly afforded no weight, let alone due weight, to Applicant's specification, in spite of his contentions to the contrary in para. 26. The examiner has clearly failed to establish even a *prima facie* case, and the two cases expressly cited by the examiner support the adequacy of Applicant's written description, and do not support the examiner's mere contention of lack of antecedent support.

Claim 22 additionally recites means 104/318 [page 5, ll. 29+; and page 10, ll. 4+] for populating a plurality of filter lists 322-330 corresponding with the stored customer application criteria for the different raw materials.

In para. 27, the examiner simply contends that this element is not sufficiently linked to the specification, yet overlooks the specification itself in simply specifying the "CPU, software, and memory."

But, if the examiner himself can link the "CPU, software, and memory" to this claim element, why then does the specification not contain sufficient antecedent support? What more does the examiner require for meeting Section 112?

Applicant's specification is replete with description of the material browser and its elements and its functions. In fact, figure 3 is expressly described at page 4 as "an illustration depicting an embodiment of a material browser."

At page 9, ll. 15+, the specification describes the browser window 300 illustrated in figure 3 as displayed on the display 112 shown in figure 1. And, the specification as indicated above expressly describes the use of the computer processor 104 for implementing the functional instructions in suitable software in one embodiment.

Page 10, ll. 4+, describe in further detail the implementation of this means element, and expressly state that the "material browser populates the drop-down filter lists 322 through 330 with entries obtained from a database containing information corresponding to the raw material types."

This description of the function associated with the populating means appears quite sufficient in accordance with the analysis presented above, including the three cases Atmel, Dossel,

and Fonar. Clearly, this second means element (b) is effected by the corresponding hardware of the computer system, as specifically programmed with the software instructions.

It is quite apparent that the examiner has not afforded any weight to the requirements of MPEP 2106, 2106.01 and 2106.02 which specifically relate to computer-implemented inventions. In contrast to the examiner's voluminous presentation in the office action under MPEP 2181, the same office action is conspicuously devoid of any corresponding presentation under these three MPEP sections 2106. This is especially significant since these computer-related sections of the MPEP require special analysis for computer-based inventions, especially in evaluating the Section 112 requirements, including antecedent support found wanting by the examiner in the objection presented in para. 4.

Applicant's claim 22 recites an apparatus based on the specific functions found therein, and is quite simply effected by the corresponding hardware, for which the examiner, without explanation, fails to find antecedent support.

The claims and specification clearly use the Federal Circuit's "magic word computer," with the full import associated therewith when analyzing the claims both for support in the specification, and for differences over the art of record.

means for displaying
Claim 22 additionally recites means 112 [page 6, 11. 11+] for displaying the material browser 300 [page 8, 11. 18+] including a plurality of filters 322-330 [page 10, 11. 4+] corresponding with the filter lists.

In para. 28 at page 22, the examiner indicates that this element "is not clearly linked;" yet, the examiner himself readily finds that the "ordinary computer monitor is the corresponding structure."

So, why then does this element not find antecedent support in the description?

Applicant's specification at page 6, line 11, introduces the display 112 operatively joined in the computer system 100 and driven by processor 104 using the specific software instructions.

Page 8, 11. 18+, and page 9, 11. 15+, describe display of the filtered lists.

Page 10, ll. 4+, describe filter area 318 and lists 322 et seq.

Clearly, these exemplary descriptions in the specification provide ample antecedent support for the third recited means (c) element; and the examiner has not shown otherwise.

Claim 22 additional recites means 104/302 [page 5, ll. 29+; and page 10, ll. 4+] for selecting one of the filter lists and specifying a filter criterion therein.

In para. 29 of the office action, the examiner repeats his "not clearly linked" basis; yet, once again the examiner readily finds that "the computer operating system and mouse" could be the corresponding structure. So, again, why does this fourth means (d) element not find adequate support in the description?

At page 5, ll. 3+, the specification describes the associated filtering or selecting process functions.

And, at page 10, ll. 4+, the filtering function is further described to permit the user to select "an entry in one or more of drop-down filter lists 322 through 330...."

The selecting element would then entail those features of the computer system, including the software specifically configured therein, to effect such selecting by the user. Quite clear in this regard is the use of the processor 104, and the specific software associated therewith.

Clearly, these exemplary descriptions in the specification provide ample antecedent support for the fourth recited means element (d); and the examiner has not shown otherwise.

Claim 22 additionally recites means 104/204 [page 5, ll. 29+; page 8, ll. 18+; and page 10, ll. 4+] for filtering the list of raw materials to obtain a filtered list thereof matching the filter criterion.

In para. 30 of the office action, the examiner repeats his "not clearly linked" basis; yet, once again the examiner readily finds that now "the CPU and software" could be the corresponding structure. So, again, why does this fifth means element (e) not find adequate support in the description?

At page 5, ll. 3+, the specification describes the associated filtering process functions.

And, at page 10, 11. 4+, the filtering function is further described to permit the user to select "an entry in one or more of drop-down filter lists 322 through 330...."

The filtering element would then entail those features of the computer system, including the software specifically configured therein, to effect such filtering of the raw material list. Quite clear in this regard is the use of the processor 104, and the specific software associated therewith.

Clearly, these exemplary descriptions in the specification provide ample antecedent support for the fifth recited means (e) element; and the examiner has not shown otherwise.

The examiner's objection to claim 22 for lack of "proper antecedent" fails to identify what features of the various elements recited therein lack such proper support. Resolution of this objection therefore requires review of not only Rule 75, and MPEP sections 608.01(o) and 2181 as the examiner indicates, but MPEP sections 2106, and Sections 112, first, second, and sixth paragraphs in an attempt to address the examiner's failure.

There can be no doubt that most of the various terms recited in claim 22 find direct antecedent support in the written description, over and over again; and the remaining "means for" words themselves are clearly implicitly found in the specification in the various hardware and software explicitly found in that specification.

Withdrawal of the examiner's objection to claim 22 for want of "proper antecedent support" in the specification is therefore warranted and is requested.

Issue 2

In paras. 2 and 3 of the first office action dated 8/02/2002, the examiner objected to the drawings.

In the amendment dated 10/21/2002, commencing on page 9 thereof, Applicant traversed the drawing objection, and proffered a proposed drawing amendment, in the event the traverse was unsuccessful.

The examiner has apparently failed to address the Applicant's traverse of the drawing objection in the following office actions

including those dated 12/17/2002; 03/27/2003; 06/06/2003; and 10/22/2003.

Accordingly, Applicant hereby additionally petitions the examiner's failure in the present final office action dated 10/22/2003 to address or rebut Applicant's outstanding traverse of the drawing objection.

Applicant requests that the drawing objection be withdrawn, as unwarranted; and, if found warranted, then Applicant requests approval of the proposed drawing amendment so that it may be submitted in final.

More specifically, Applicant traverses the objection to the drawings as being unwarranted by the examiner's interpretation of the Rules and the MPEP.

More specifically, the examiner's objection pertains to method claims 1-7, which are different than apparatus claims 8-14.

Clearly the structural features of the apparatus claims are illustrated in the drawings, along with the flow chart and material browser for the method claims.

The examiner's contention that every claim feature must be shown in the drawings is not an absolute requirement since it is common practice for patents to be granted without any drawings at all; irrespective of the claims. See for example USP 5981612 and USP 6495652, both of which contain process claims, and both of which have no drawings whatsoever.

Rule 81(a) requires drawings only where necessary for understanding the invention.

Rule 81(b) indicates that the drawings "may include" flowsheets; this is permissive language, not mandatory language.

And, MPEP 608.02(d) states that "structural details" must be illustrated.

Accordingly, Applicant's figures 1-3 comply with these provisions for illustrating only the necessary structural details of the claimed apparatus; while additionally illustrating features of the method claims.

The examiner should not overlook the function of the written specification in describing the method claims for meeting the requirements of Section 112, notwithstanding the drawing. The

specification amply supports the method claims, in conjunction with the drawings as originally filed.

Nevertheless, it appears that the drawings already adequately illustrate the very method features being objected to by the examiner.

The user query of claim 1 [para. 2a of the 8/2/02 office action] is illustrated in step 202 of figure 2 (page 8, lines 18+), and in the window 300 of figure 3 (page 9, lines 15+; page 10, lines 4+; and page 3, lines 21+).

The transmitting input of claim 5 [para. 2b] is illustrated in step 210 of figure 2 (page 9, lines 11-14).

The list sorting of claim 6 [para. 2c] is illustrated in box 302 of figure 3 (page 10, lines 25-27).

The examiner's contention in para. 3 of the first office action that the "claims are replete" with drawing errors is traversed; since method claims 1-7 appear to be suitably represented in the drawings, and described in the specification in accordance with the Rules and MPEP.

Applicant specifically requested that the examiner provide due notice under MPEP 608.02(d) & (e) of each and every occurrence in claims 1-7 being objected to since Applicant cannot speculate as to the examiner's interpretation of the claims and drawings and drawing Rules and MPEP provisions; yet, the examiner has not responded to this request.

In view of the traverse of the drawing requirement, and the apparent compliance of the original drawings with Rule 83 there should be no need to amend the drawing as the examiner requires.

Accordingly, withdrawal of the drawing objection is warranted and is requested.

In the alternative, should the drawing objection be sustained, approval of the proposed drawing amendment is warranted and is requested.

In the additional possibility that the proposed drawing correction is found unacceptable, Applicant further petitions that the prosecution be re-opened, before or after resolution of the Appeal being separately pursued, solely for providing Applicant the opportunity to re-address the drawing issue in view of the

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examiner's failure to address the issue in the second, non-final, office action dated 12/17/2002 which immediately followed the first amendment dated 10/21/02.

Yet further, should the Petition not be considered as requiring reconsideration firstly by the examiner, and notwithstanding the finality of the office action; then Applicant requests that this petition be considered a request to the examiner for reconsideration of the objection issues raised herein. Then, any further petition made necessary following such reconsideration by the examiner will later be resubmitted.

The prosecution of this application has been rendered extraordinarily complicated by the various office actions; and due process and fair play warrant that a suitable remedy be offered now to the Applicant under this petition.

No fee is believed required for this petition, but should a fee be required, that fee may be charged to Deposit Account No. 14-0225 of NCR Corporation.

Respectfully submitted,



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